No. 83-5298

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM: 1983

ORLANDO CANEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
AUG 22 1983
Alexander L. Stevas, Clerk

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the District Court of the Virgin Islands, whose judges have less than lifetime tenure and are subject to removal by the President, have constitutionally sufficient jurisdiction to try cases under the United States Criminal Code even though the Virgin Islands is subject to immediate rule from Washington?

2. Are the due process rights of petitioner violated by his conviction for violating federal fraud laws through his local activity as an employee of the Government of the Virgin Islands on the premise that that Government is a federal agency, when the Virgin Islands Organic Act fails to define cause for removal of judges of the District Court of the Virgin Islands?

3. Did the Court of Appeals err in holding that petitioner could violate 18 U.S.C. § 1001 by purely local action on the ground that the Government of the Virgin Islands is an agency of the United States for purposes of § 1001?

PARTIES BELOW

Petitioner's co-defendant, Jose Figueroa, appeared as an appellant in the proceeding in the Third Circuit Court of Appeals whose judgment is here sought to be reviewed by this petition.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is now reported at 708 F.2d 894 (3rd Cir. 1983) and is found in the appendix to this petition at p.4a. The opinion and order of Judge David O'Brien in the District Court of the Virgin Islands is unpublished but is also found in the appendix to this petition at p.12a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A panel of the Third Circuit Court of Appeals entered its judgment on May 31, 1983. App. at p. 3a. A timely Petition for Rehearing En Banc was filed on June 13, 1983. On June 23, 1983, the petition for rehearing was denied. App. at p. 1a. 28 U.S.C. § 1254(1) is believed to confer jurisdiction on this Court to review the judgment of the Third Circuit Court of Appeals by a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 3, United States Constitution, Section 1, states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article 3, United States Constitution, Section 2, states in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...

Article 4, United States Constitution, Section 3,

Clause 2, states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

18 U.S.C. § 2 states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 states in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, [illegible] covers up by any trick, scheme, or device a material fact, or makes any

false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmit or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more that Five years, or both.

18 U.S.C. § 2314 states in pertinent part:

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited ... shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

48 U.S.C. § 1561 states in pertinent part:

No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal cause to give evidence against himself; not shall any person sit as judge or magistrate in any case

in which he has been engaged as attorney or prosecutor.

48 U.S.C. § 1614 states in pertinent part:

> The President shall ... appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of eight years ... unless sooner removed by the President for cause.

STATEMENT OF THE CASE

In 1976 and 1977 the Government of the Virgin Islands, Public Works Department, Division of Roads and Highways, was badly in need of heavy trucks. As the Director of that Division, petitioner was authorized to purchase several from Mr. Jose Figueroa of Puerto Rico, at very good prices at a bankruptcy sale. Apparently, however, various officials of Public Works misunderstood the role of Mr. Figueroa in the sale. They all testified at trial that at a single meeting more than 5 years earlier petitioner had represented that Mr. Figueroa was the administrator of the bankrupt estate.

Mr. Figueroa was a businessman who had been appointed a court administrator in Puerto Rico, but had bought the trucks and others from the actual administrator of the bankrupt estate.[1/] The bankruptcy administrator had told petitioner that Mr. Figueroa

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1/ A former president of the Bar Association of Puerto Rico testified at trial that in Puerto Rico's civil law a "court administrator" is a judicially appointed individual who is charged with the administration of an intestate estate.

had owned the "whole lot."

Petitioner's then supervisor, the former commissioner of Public Works, testified that although he may have misunderstood the role of Mr. Figueroa, in any event it would not have made a difference to him if the seller was a middle man since he would have gone ahead with the purchase anyway. The former commissioner stated during trial that he had no doubt that he would want petitioner as his director if he became commissioner again.

Following the purchase of the trucks by petitioner, Mr. Figueroa requested from Public Works that a public unpaved and hazardous road, which bounded property the latter had purchased to build an FM transmission tower, be paved. The commissioner granted authorization to petitioner to pave the road on condition that Mr. Figueroa pay for any overtime work done by the Division's workers.

In August of 1978 the United States Attorney filed an information charging petitioner and Mr. Figueroa with various fraud and embezzlement charges under Virgin Islands law, alleging in essence that they had aided and abetted each other in the appropriation of government materials and equipment for the benefit of Mr. Figueroa's FM tower construction.

In December of 1978 the District Court, on the U.S. Attorney's motion, dismissed those charges.

On May 3, 1982 the U.S. Attorney filed another information against petitioner and Mr. Figueroa charging one count of conspiracy (18 U.S.C. § 371) and other federal charges (18 U.S.C. §§ 2314, 1343, 1001 and 2).[2/] The single conspriacy count alleged that petitioner and Mr. Figueroa conspired in a scheme to defraud the United States with respect to both the truck sales and the road/antenna project.

A mid-trial motion for acquittal resulted in dismissal for all those charges which pertained to the road/antenna project.

Petitioner was found quilty by a jury of the remaining federal charges.

On appeal, the Third Circuit Court of Appeals affirmed, and endorsed the District Court's refusal to dismiss for want of jurisdiction. It explored petitioner's Article III and Due Process contentions and found that American Insurance Co. v. Canter, 26 U.S. 388 (1828) continued to be vital law, and that the "recognized defects in Section 1614(a)" were not of due process dimensions.

2/ There is no constitutional right to a grand jury in the Virgin Islands; thus the U.S. Attorney may freely refile charges by information. Government of the Virgin Islands v. Dowling, 633 F.2d 660 (3rd Cir. 1980).

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. TO MAINTAIN A FEDERAL COURT WITHOUT ARTICLE III SAFEGUARDS IN THE UNITED STATES VIRGIN ISLANDS IS UNNECESSARY - THE TRADITIONAL REASONS BEING ABSENT - AND THREATENS THE INTEGRITY, AND UNDERMINES THE BASIS, OF OUR GOVERNMENT.

> "Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots. Doctrines like those expressed by the ... series of cases beginning with American Insurance Co. v. Canter, 1 Pet. 511, must be placed in their historical setting. They cannot be wrenched from it and mechanically transplanted into an alien, unrelated context without suffering mutilation or distortion." Reid v. Covert, 354 U.S. 1, 50 (1956)(Frankfurter, J., concurring).

The Virgin Islands is one of the outlying territories acquired by the United States at the turn of the century.

This Court's decisions in the early part of the century in the so-called Insular Cases dealing with these newly-acquired outlying territories basically held that the Constitution "does not follow the flag" to a newly acquired possession until such time as Congress expressly "incorporates" the territory into a recognized body politic with an implied promise of statehood.

Each of those cases raised the question whether a particular constitutional protection was so "fundamental" that it served to restrict the plenary power of Congress under Article IV, § 3 of the Constitution to make all needful rules and regulations respecting the territories. In Downes v. Bidwell, 182 U.S. 244 (1901), this Court held that the constitutional prohibition on interstate customs duties was inapplicable to the territory of Puerto Rico. In Dorr v. United States, 195 U.S. 138 (1904), the Court decided that the Sixth Amendment right of the accused to a trial by jury was not so fundamental as to limit Congress' authority to govern the territories. "Until Congress shall see fit to incorporate territory ceded by treaty into the United States," the Court held, "... the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such restrictions ... as are applicable to the situation." Id. at 143 (emphasis supplied).

But, just as Justice John Harlan pointed out in his dissent in Dorr that race played a role in those decisions, Id. at 154, [3/] no objective principle was ever articulated to deter-

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3/ Justice Harlan's suggestion that the restrictions on rights may have been grounded in racism is not entirely without evidence. Chief Justice Edward D. White, the primary architect of the incorporation doctrine, was a private in the confederate army during the Civil War, and had expressed his notions of racial superiority to at least one commentator. See Coudert, "Exposition of the Doctrine of Incorporation," 26 Columbia Law Review, 832 (1926). See, also, W. W. Willoughby, The Constitutional Law of the United States, (2d e. New York 1929), I, 476, commenting on Downes v. Bidwell, supra, 182 U.S. 244 (1901), stressed that the character of the population of these territories as having been the most important factor in influencing the incorporation doctrine.

mine which constitutional protections were, as the Court in Dorr put it, "applicable to the situation."

We do know, however, that the refusal to extend the Sixth Amendment's jury right to even the new U.S. citizens of Puerto Rico was grounded on a stated deference to both local custom and local automony. In Balzac v. Porto Rico, 258 U.S. 298 (1922), the Court noted that a "people like the Filipinos or the Porto Ricans" had been trained to a ... system which knows no juries," and reasoned that Congress could properly refuse to extend the right to jury in order to permit the inhabitants "themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when." Id. at 310. The Court again, in Reid v. Covert, supra, 354 U.S. 1, 13 (1956), noted that certain constitutional safeguards if extended to those then-newly acquired territories would have disrupted certain long-established "history and habits" of the population. Id. at 51 (Frankfurter, J., concurring.)

Here, however, the right to an independent judiciary in the trial of United States criminal laws must be deemed as "fundamental" as the right of an accused to confront witnesses against him in prosecutions in the Virgin Islands. See Soto v. United States, 273 F.2d 628 (3rd Cir. 1921). Even were we to assume that as a newly acquired territory they were not, after living as Americans for more than 60 years the Virgin Islands people are certainly amenable to the safeguards provided by Article III.

The courts below simply asserted the " continued vitality" of American Insurance Co. v. Canter, supra, 26 U.S. 388 (1 Pet.)(1828). Yet without any analysis of its historical context. First, Canter dealt not with a person criminally accused and facing prosecution by the Executive Branch, but with whether a territorial court created by Congress having judges without life tenure could determine the faith of a cargo of cotton in an action in admiralty in the incorporated territory of Florida. Second, as an incorporated territory, Florida was destined to become a state and therefore, as was the case when it did so become, its three territorial courts would be replaced by one Federal District Court. See Glidden Co. v. Zdanok, 370 U.S. 530, 545-47 (1962)(declaring that the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III of the Constitution).[4/]

In Glidden, Justice Harlan reviewed the context of Chief Justice Marshall's opinion in Canter and wrote:

> The concept of a legislative court derives from the opinion of Chief Justice Marshall in American Insurance Co. v. Canter, 1 Pet. 511, dealing with courts established in a territory. A cargo of cotton salvaged from a wreck off the coast of Florida had been purchased by Canter at a judicial sale ordered by a court at Key West in-

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4/ Glidden was a plurality opinion. Justices Frankfurter and White took no part in the consideration or decision of this case. Justice Clark, with whom the Chief Justice joined, filed an opinion concurring in the results. 370 U.S. at 585. Justice Douglas, with whom Justice Black joined, filed a dissent. Id. at 589.

vested by the territorial legislature with jurisdiction over cases of salvage. The unsurers, to whom the property in the cargo had been abandoned by the owners, brought a libel for restitution, claiming in part that the prior decree was void because not rendered in a court created by Congress, as required for the exercise of admiralty jurisdiction under Article III. Chief Justice Marshall for the Court swept this objection aside by noting that the Superior Courts of Florida, which had been created by Congress, were staffed with judges appointed for only four years, and concluded that Article III did not apply in the territories:

> 'These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.' 1 Pet., at 546.

By these arresting observations the Chief Justice certainly did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. Elsewhere in the opinion he distinctly referred to the provisions of Article III to show that it was such a case. 1 Pet., at 545. All the Chief Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided

in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

The reasons for this are not difficult to appreciate so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind. The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government. This meant that courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State. But when the territories began entering into statehood, as they soon did, the authority of the territorial courts over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge.

At the same time as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington: in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within

> the framework of organic acts and subject to a retained power of veto. The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States, and the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was as fully recognized.
>
> Against this historical background, it is hardly surprising that Chief Justice Marshall decided as he did. It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee of tenure that Congress could not put to use and that the exigencies of the territories did not require. (Footnotes ommitted and emphasis supplied.)

Id.

Alas, it would be dogmatic and doctrinaire to the extreme to refuse to determine whether the conditions of the present-day territories justify the holding made in Canter 150 years ago. Indeed, the Court in Glidden noted that it was not deciding "whether the same conditons still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them." 370 U.S. at 548, n. 9.

See, also, O'Donoghue v. United States, 289 U.S. 516, 536-37 (1933) where a clear majority of the court stated (6-3) that "the absence from the Constitution of such guarantees for

territorial judges was no doubt due to the fact that the organization of governments for the territories was but temporary, and would be superceded when the territories became states of the Union." (Emphasis supplied.)

The Virgin Islands is an unincorporated territory. 48 U.S.C. § 1541(a). Its government is therefore not temporary, i.e., it cannot be ceded into the United States until, if ever, Congress first grants it "incorporate" status. Dorr v. United States, supra, 195 U.S. 138, 143 (1904). The "temporality" argument which militates against Article III safeguards are therefore absent.

The Court of Appeals cited Government of Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974), and United States v. Montanez, 371 F.2d 79 (2d Cir.), cert. denied, 389 U.S. 884 (1967), as having dealt with the issue here. These cases, to the extent they are not dissimilar, actually supports petitioner's position. In Scott, the Canal Zone's status was being renegotiated at the time of that decision. 502 F.2d at 570. The Court therefore cited Glidden v. Zdanok, supra, 370 U.S. 530, 546-47 (1962), to point out that the exigencies of the Canal Zone was not amenable to Article III safeguards, i.e., life tenured judges.

The Canal Zone recently reverted to the Republic of Panama.

In the Virgin Islands, Congress, on the other hand has extended the right to draft a local constitution so long as

the sovereignty of the United States is recognized in the document. See Annot. to 48 U.S.C.A. § 1541 for that document as approved by Congress.

In Montanez, the defendant attempted to persuade the Second Circuit Court of Appeals to ignore his narcotic conviction rendered in the United States District Court for Puerto Rico on ground that that Court lacked Article III safeguards. However, the Second Circuit noted that as an inferior federal court it could not ignore Canter, and rejected defendant's contention; yet the Court concluded its opinion by stating:

> It is perhaps unfamiliar and even jarring to contemplate enforcement in Puerto Rico of national criminal statutes by judges with less than life tenure. Fortunately, that situation has been altered for the future by Congress.

United States v. Montanez, 371 F.2d 79, 84 (2d Cir.), cert. denied, 389 U.S. 884 (1967). (Footnotes ommitted.)

> II. WHERE THE ENTIRE GOVERNMENT OF A TERRITORY OR MUNICIPALITY IS DEEMED A FEDERAL AGENCY FOR PURPOSE OF FEDERAL CRIMINAL LAW ENFORCEMENT, IT VIOLATES DUE PROCESS TO TRY AN ACCUSED FOR FEDERAL CRIMES STEMMING FROM ASSOCIATION WITH SUCH GOVERNMENT IN A COURT NOT INSULATED FROM THE FEDERAL EXECUTIVE BRANCH.

The Third Circuit declared that the Virgin Islands Government is a federal agency for purposes of 18 U.S.C. § 1001 enforcement. Petitioner was convicted of violating § 1001 and other related federal crimes stemming solely from his activity

as an employee of the Virgin Islands Government. He was tried in a court which the Court of Appeals conceded was subject to the influence of the Executive Branch. See United States v. Canel, 708 F.2d 894, 897 (3rd Cir. 1983).

There is irony here. Had petitioner been tried in a local court, the judge thereof would not have been subject to influence from the President.

The Due Process Clause of the Constitution is applicable to the criminally accused in the Virgin Islands. See 48 U.S.C. § 1561. In his dissenting opinion in Crowell v. Benson, 285 U.S. 22, 87 (1931), Justice Brandeis stated that "the Constitutional requirement of due process is a requirement of judicial process." Because the due process has been extended to the United States Virgin Islands, whether it has been afforded must be determined in the traditional manner. See Virgin Islands Hotel Assoc. Inc. v. Virgin Islands Water & Power Authority, 476 F.2d 1263, 1266-67 (3rd Cir.), cert. denied, 414 U.S. 1067 (1973). Thus, the nature of alleged right, i.e., to an impartial tribunal, must be conrasted with the nature of the proceeding, and the possible burden on that proceeding. Here, petitioner was deprived of his liberty in a prosecution by the President's representative in a tribunal directly under the influence of the President, i.e., its judge could be removed at anytime by him. One need not look far to ascertain that petitioner's due process right was violated.

The Appeals Court noted that in spite of the "recognized defects in Section 1614(a)," it could not hold in petitioner's favor because such a "doctrine would undermine the authority of many state courts to function." However, no state government is a federal agency for purposes of 18 U.S.C. § 1001.

III. TO HOLD THAT THE ENTIRE VIRGIN ISLANDS GOVERNMENT IS A FEDERAL AGENCY FOR PURPOSES OF §1001 WOULD BE TO EFFECTIVELY CHILL LOCAL OFFICIALS IN THEIR LOCAL FUNCTIONS.

The Appeals Court held that the Government of the Virgin Islands is a federal agency within the language of § 1001 by a mere parenthetical note that its records are subject to audit by the Interior Department. No attention whatsoever was given to the far-reaching consequence of such a holding. For example, a local official may be authorized to post or ante date a record for local government convenience, without criminal intention. What if a federal auditor testified that he was effectively mislead by the "statement" of the local official? Sure, the official may compel testimony of his superior in his defense, but that is assuming conspiracy is not charged against his superior, thus effectively undermining his credibility and availability as a witness. Petitioner believes that the chilling effect is self-evident and need say no more.

CONCLUSION

In the American way of life, an independent judiciary is essential to our basis of government. In the early days of territorial government, an exception was made because the exigencies and realities of these territories did not permit the application of Article III safeguards.

This Court, however, has never looked at the present-day realities to determine whether the basis for the exception to the rule exists. Petitioner is now requesting that that be done in this case.

This case grows out of the power of the Executive Branch over a modern-day territory - the United States Virgin Islands - as ruled from Washington. That fact, by itself requires an independent federal judiciary in the Virgin Islands.

Federal due process rights, extended to the United States Virgin Islands, requires an independent judiciary in the Virgin Islands.

The lack of judicial independence is compounded by the fact the United States Court of Appeals for the Third Circuit has ruled that the Government of the Virgin Islands is a federal agency. Petitioner argues that such a holding unduly limits the exercise of discretion afforded under the American form of gov-

ernment to local officials in the exercise of their duties involving local matters.

WHEREFORE, petitioner respectfully requests that the Court grant his petition and review the judgment of the Court below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3003

UNITED STATES OF AMERICA

v.

ORLANDO CANEL,

Appellant

(D. C. Criminal No. 82-72-01)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: June 23, 1983

United States Court of Appeals

For the Third Circuit

Nos 83-3003/4

UNITED STATES OF AMERICA

vs.

ORLANDO CANEL, Appellant in No. 83-3003

JOSE FIGUEROA, Appellant in No. 83-3004

(D. C. Crim. Nos. 82-72-01 and 82-72-02)

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Present: GIBBONS, SLOVITER, and BECKER, Circuit Judges

JUDGMENT

These causes came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John and were argued by counsel April 28, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered November 15, 1982 be, and the same are hereby affirmed.

ATTEST:

Sally Divver
Clerk

May 31, 1983

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1983

Test:
Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit

COPY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3003

UNITED STATES OF AMERICA

v.

ORLANDO CANEL,

Appellant

(D.C. Crim. No. 82-72-01)

No. 83-3004

UNITED STATES OF AMERICA

v.

JOSE FIGUEROA,

Appellant

(D.C. Crim. No. 82-72-02)

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Argued: April 28, 1983

Before: GIBBONS, SLOVITER and BECKER,
Circuit Judges

(Opinion Filed: May 31, 1983)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

Orlando Canel and Jose Figueroa appeal from judgments of sentence imposed following their conviction, in a jury trial in the District Court of the Virgin Islands, of violations of 18 U.S.C. §371 (1976) (conspiracy), 18 U.S.C. §2314 (1976) (transporting in commerce checks obtained by fraud), 18 U.S.C. §1343 (1976) (wire fraud), and 18 U.S.C. §§1001 and 2 (1976) (false statements to an agency of the United States). Their principal contention on appeal is that they could not constitutionally be tried in the District Court of the Virgin Islands for viola-

tions of federal criminal statutes of general application. They also make several objections to the sufficiency of the evidence and the manner in which the trial was conducted. We affirm.

I

The charges of which Canel and Figueroa were convicted arose out of purchases of two truck-tractors by the Government of the Virgin Islands, Division of Roads and Highways. Mr. Canel was the Director of that Division at the time of the purchase, and Mr. Figueroa was the seller. The trucks were formerly owned by Tri-County Truck Sales, a bankrupt Puerto Rico company. In essence the fraudulent scheme involved representations to various officials of the Virgin Islands Government that Figueroa was the "administrator" of the bankrupt company, and that by dealing with him instead of soliciting competitive bids the Government would be obtaining the vehicles at "rock bottom prices." In fact, Figueroa had no connection with the administration of the bankrupt company, but purchased the trucks from it at prices significantly lower than the prices charged the Government. Canel and Figueroa succeeded in convincing Virgin Islands officials that normal purchasing practices should be bypassed in order to prevent the "administrator" from disposing of the bargain trucks elsewhere.

II.

Canel and Figueroa make two distinct challenges to the power of the District Court of the Virgin Islands to try them for violations of Title 18 of the United States Code, neither of which has merit. The first is that only an Article III judge may preside at the trial, anywhere, of a charge of violation of the criminal laws of the United States of general application. The second is that the trial of a criminal charge before a judge enjoying the limited tenure afforded to judges of the District Court of the Virgin Islands violates due process.

A. *The Article III Contention*

The appellant's argument that life-tenured judges must preside at criminal trials under federal criminal statutes of general application is predicated upon the recent opinion of the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S.Ct. 2858 (1982), which holds that Congress may not, within the territory of the several states, constitutionally authorize the trial of proceedings relating to bankrupty before judges who are not protected by the life tenure and salary clauses of Article III. The appellants read far too much into *Northern Pipeline*, however, for it casts no doubt upon the continued vitality of *American Insurance Co. v. Canter*, 26 U.S. 388 (1 Pet.) (1828), holding that Congress has Article I legislative authority to select courts having limited tenure for the territories over which the United States maintains sovereignty. Indeed the Court expressly noted in *Northern Pipeline* that the "[territorial courts] exception from the general prescription of Article III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government." ____ U.S. at ____, 102 S. Ct. at 2868. The general powers of government include the power to choose appropriate judicial tribunals.

In *Palmore v. United States*, 411 U.S. 389 (1973), and *Swain v. Pressley*, 430 U.S. 372 (1977), the Court recognized the sovereign power of Congress to provide for term-tenured judges in the District of Columbia by virtue of the grant of legislative authority over that territory in Art. I, §8, cl. 17 of the Constitution. Congressional sovereign power under Art. IV, §3, cl. 2 is at least as broad. Appellants urge that the *Palmore* and *Pressley* cases are distinguishable, in that they dealt with the provisions in D.C. Code Ann. §11-923 (Supp. V 1972) of the District of Columbia Court Reform and Criminal Proce-

dure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, which gives the term-tenured judges of the Superior Court of the District of Columbia jurisdiction in criminal cases involving alleged violations of the criminal laws applicable only to the District of Columbia. The life-tenured judges of the United States District Court retain jurisdiction over offenses in violation of federal statutes of general jurisdiction. D.C. Code Ann. §11-502 (Supp. V 1972).

We recognize the distinction. We note, however, that Congress has made no provision for a United States District Court for the Virgin Islands. It has only provided for a District Court of the Virgin Islands. *See United States v. George*, 625 F.2d 1081, 1087-88 (3d Cir. 1980). In the Organic Act for the Virgin Islands, Pub. L. No. 95-598, 92 Stat. 2680, it has conferred on that court "the jurisdiction of a district court . . . of the United States in all causes arising under the Constitution, treaties and laws of the United States. . . ." 48 U.S.C. §1612 (1976 & Supp. V 1981). Moreover, in 18 U.S.C. §3241 (1976) it has provided that the "District Court of the Virgin Islands shall have jurisdiction of offenses under the laws of the United States, not locally inapplicable, committed within [its] territorial jurisdiction." We have consistently held that the District Court of the Virgin Islands may exercise that jurisdiction. Indeed *United States v. George*, 625 F.2d 1081, is such a case. Were we to hold that Title 18 could not be enforced in the District Court of the Virgin Islands, the entire title would be for all intents and purposes a dead letter in the territory. Obviously in making provision for the exercise in the Virgin Islands of the jurisdiction, civil and criminal, of United States District Courts, Congress assumed that it had the plenary sovereignty recognized in *American Insurance Co. v. Canter*.

Recognizing that *Northern Pipeline* must realistically be read as a disavowal by the majority of some of the more expansive statements in Justice White's *Palmore* opinion respecting congressional power to

dispense with Article III judges in sanctioning contexts, we find nothing in it suggesting any erosion of the *Canter* holding. Congress obviously could, as it has in the District of Columbia and Puerto Rico,[1] provide for life-tenured judges for federal as distinct from local matters. Outside the geographical limits of the states which are members of the federal union, however, the tenure and compensation guarantees of Article III, section 1 have been for too long recognized to be matters of legislative grace rather than constitutional right for this court to hold otherwise. Other courts which have explicitly considered the question have reached the same conclusion. *See Government of the Canal Zone v. Scott*, 502 F.2d 566, 570 (5th Cir. 1974); *United States v. Montanez*, 371 F.2d 79 (2d Cir. 1967), *cert. denied*, 389 U.S. 884 (1967).

B. *The Due Process Contention*

The appellants predicate their due process contention on 48 U.S.C. §1614(a) (1976), which provides that the judges of the District Court of the Virgin Islands "shall hold office for terms of eight years . . . unless sooner removed by the President for cause." They point out that nowhere in the Organic Act or elsewhere is cause for removal defined. Thus, they urge, the judges of the district court are at all times subject to the possibility that the federal executive may attempt to apply the removal provision in section 1614(a) in an arbitrary manner. Moreover, even if the President leaves the judge alone during the term, there is always the problem of failure of reappointment if the actions of a given judge are less than satisfactory to the Department of Justice.

Appellants' objections to the removal and term tenure features of section 1614(a) have been regarded sen-

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1. *See* 28 U.S.C. §133 (1976 & Supp. V 1981) (providing for appointment of district judges).

ously in some quarters. A leading commentator has observed:

> If judicial independence is of vital importance in the states, it is hard to see why it is not equally valuable to the territories. The district judges there try persons for crimes against the United States. They hear civil cases in which the United States is a party. They should be able to decide such cases fearlessly and impartially, without being dependent upon the Department of Justice for their continued tenure. Unfortunately instances are not unknown of territorial judges who have not been reappointed, under circumstances where it appears that they have been denied reappointment because of decisions displeasing to the appointing authority. So long as these judges have limited tenure, the possibility of such abuse, or apparent abuse, will persist. The granting to these judges of tenure during good behavior, as was recently done for Puerto Rico, would be desirable.

(Footnotes omitted). C. Wright, Law of Federal Courts §11 at 49 (4th ed. 1983). Even if one were to posit that section 1614(a) is an undesirable statute, it is a long jump to holding that a trial before judges appointed under it violates due process of law. No authority has been called to our attention holding that defects in the process whereby judges may be removed or reappointed can be relied upon by litigants to challenge the capacity of those judges to render decisions satisfying due process. Indeed it seems likely that such a doctrine would undermine the authority of many state courts to function. Thus we reject appellants' contention that the recognized defects in section 1614(a) are of due process dimensions for litigants.

Appellants' remaining contentions need not long detain us. Both defendants contend that the evidence was insufficient to sustain a finding of guilt on any count. Our examination of the record discloses otherwise. Mr. Canel urges that the court should have granted him a new trial for prejudical joinder. There was no pre-trial motion for a severance, and on this record we cannot hold that a post-verdict denial of a motion for a new trial on this ground was an abuse of discretion. Mr. Canel also contends that a statement taken from him was introduced in evidence in violation of *Massiah v. United States*, 377 U.S. 201 (1964). There were no charges pending against him and no attorney representing him when the statement was given after he was fully warned about his rights. Mr. Figueroa contends that none of the false statements in evidence violated 18 U.S.C. §1001 (1976) because none were made within the jurisdiction of an agency of the United States. *But see* 48 U.S.C. §1599 (1976 & Supp. III 1979) (Inspector General of Interior Department audits accounts of the Government of the Virgin Islands). Finally, Mr. Figueroa urges that he is entitled to a new trial because the government utilized peremptory challenges to exclude persons of Puerto Rican ethnic background from the jury. We decline to change the rule that neither side need justify the use of peremptory challenges.

IV.

The judgments appealed from will therefore be in all respects affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U.S. Courts, The Legal Intelligencer, Phila., Pa.)

FILED THIS DAY OF
Clerk of the
By
Deputy

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

UNITED STATES OF AMERICA, Plaintiff, vs. ORLANDO CANEL and JOSE (TONY) FIGUEROA, Defendants.	CRIMINAL NO: 82-72 U.S.C. §§371; 2314; 1343; 1001,2 CONSPIRACY: TRANSPORTING CHECKS OBTAINED BY FRAUD: WIRE FRAUD: FALSE STATEMENT

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DAVID V. O BRIEN, Judge

MEMORANDUM OPINION AND ORDER
(Filed November 17, 1982)

The defendants in this case were originally charged with one conspiracy count and twelve other federal "white collar crimes" arising out of two separate sets of circumstances. The first set of circumstances involved the alleged unauthorized use of work crews and equipment of the Virgin Islands Department of Public Works on property owned by one of the defendants for his personal benefit. The second set of circumstances involved government purchases by defendant Canel, in his capacity a

a division head within the Department of Public Works, of three trucks from defendant Figueroa, who falsely represented himself as an administrator of a bankrupt estate in Puerto Rico. Specific acts alleged in the conspiracy count included the use of the telephone for the numerous telephone calls made from the Department of Public Works to Puerto Rico, preparation of various documents to cover-up the fraud, and interstate travel.

All the counts involving the unauthorized use of the government work crews and equipment were dismissed by the Court on defendants' motion for acquittal at the end of the prosecution's case. The jury was left to consider seven of the original thirteen counts dealing with the truck purchases. At the close of all the evidence defendants renewed their motion of acquittal and it was denied.

Defendant Canel was convicted on all seven counts. Defendant Figueroa was convicted on five of the seven counts. Each was convicted of conspiracy, obtaining money by fraud, use of interstate telephone wires, and making and using false documents. Defendant Canel was also convicted of two additional counts of making and using false documents.

Both defendants filed motions for judgment notwithstanding the verdict or in the alternative for a new trial. The motions will be denied for the reasons stated herein.

I. JURISDICTION UNDER 18 U.S.C. §§1001,371

Defense counsel separately raise and join in each other's motion the question as to whether the defendants could be found guilty under the federal statutes 18 U.S.C. §§1001, and 371 when, they allege, the acts were committed against the Virgin Islands Government. Basically, counsel argue that the transactions the defendants were found guilty of are all against the territory and are not "within the jurisdiction of any department or agency of the United States" as the

conspiracy committed against the United States, or an agency thereof," as required by those statutes.

This Court does not dispute the fact that the defendants could have been found to have defrauded the Virgin Islands Government under Virgin Islands law. See 14 V.I.C. §§551,843. The Court does not dispute in this case the fact that the Virgin Islands Government, particularly the Department of Public Works, is not the United States Government of a federal agency or department. See Harris v. Boreham, 223 F.2d 110, 114-16 (3d Cir. 1956)(V.I. municipality not a federal government department or agency); Dudley v. Commissioner of Internal Revenue, 258 F. 2d 182 (3d Cir. 1958)(U.S. Tax Court lacked jurisdiction to hear tax deficiency appeal because notice issued by territorial officer). The Court finds, however, that a violation has been committed against a federal department, the U.S. Department of Interior, as well.

A. Section 1001 - Counts 10, 11, 12 and 13

Counts 10, 11, 12 and 13 alleged that the defendants made and used false and fraudulent statements to procure a Disbursement Voucher for $35,000; to justify the "open market" purchase of the dump truck in a letter to the Governor written by defendant Canel; to certify that defendant Figueroa was the vendor of the dump truck in a requisition; and to procure a Government Transportation Request to Puerto Rico. The transactions were all done in violation of 18 U.S.C. §1001 and 2. Section 1001 provides

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both

The issue, as phrased by counsel for defendant Figueroa, and paraphrased here, is whether the fact that the U.S. Department of Interior has lawful authority to audit the financial affairs of the Virgin Islands Government renders a fraud basically against the Virgin Islands Government an offense against the U.S. Government or one of its agencies or departments. The prosecution, responding in the affirmative, argues that because the fraudulent statements found their way to the federal government comptroller, an agent of the U.S. Department of Interior, as a part of his statutory auditing functions, the documents and statements made constituted a fraud against the U.S. Department of Interior. The auditing of these records, it is further argued, is a matter "within the jurisdiction" of a federal department, citing to United States v. Cartwright, 632 F.2d 1290 (5th Cir. 1980). We agree with the prosecution.

Under section 17 of the Revised Organic Act of 1954 (hereafter the "Act"), 48 U.S.C. §1599, the financial affairs of the Virgin Islands Government are monitored by a government comptroller who is appointed by the Secretary of the U.S. Department of Interior (hereafter the "Secretary") and is under his general supervision. Section 17(a) specifically provides that the government comptroller is not part of any executive department of the Virgin Islands Government (hereafter the "Government"). He is mandated to audit all expenditures of funds pertaining to the Government which includes bringing to the attention of the Secretary of the Interior and the Governor of the Virgin Islands all irregular expenditures of funds. The office and activities of the government comptroller are subject to review by the Comptroller General of the United States. While the government comptroller may perform some territorial functions,[1] he is a federal

1 See 48 U.S. 1405.

employee or agent of the U.S. Department of Interior. See Harris v. United States, 125 F. Supp. 536, 541 (D.V.I. 1954) (Superintendent of Public Works for the municipality of St. Thomas and St. John, appointed and paid by the Secretary, was a "federal employee" under the Federal Tort Claims Act although he performed both territorial and federal functions).

Cartwright involves a case where defendant was convicted under §1001 for submitting false statements to a lending institution which was a wholly-owned subsidiary of a federally-insured savings and loan association. The federal agency had statutory authority to "make examinations" into the institutions it insured "for its protection and the protection of other insured institutions," which authority was extended, in that case, to the wholly-owned subsidiary. Fraudulent statements submitted by defendant to the subsidiary were considered "within the jurisdiction" of the federal agency. The U.S. Supreme Court, in discussing the amendment to 18 U.S.C. §80, later renumbered 18 U.S.C. §1001, which added the phrase "within the jurisdiction of any department or agency of the United States," stated:

> The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.

United States v. Gilliland, 312 U.S. 86 93(1940).

In the present case, the government comptroller has statutory authority to audit the Government's expenditures. The purposes of the government comptroller's auditing activities are to:

> improve the efficiency and economy of programs of the government of the Virgin Islands, and... discharge the responsibility incumbent upon the Congress to insure that the substantial Federal revenues which are covered into the treasury of the government of the Virgin Islands are properly accounted for and audited.

48 U.S.C. §1599(c). The submission of fraudulent documents would and does interfere with the lawful functions of the government comptroller, which includes accounting for and auditing the federal revenues as well as the territorial revenues. The submission of these documents, therefore, does involve matters "within the jurisdiction" of the U.S. Department of Interior.

The defendants cite to Ebeling v. United States, 248 F.2d 429 (8th Cir.), cert. denied, sub nom., Emerlin v. United States, 355 U.S. 907 (1957), a case which the Third Circuit cited as controlling in United States v. Waters, 457 F.2d 805 (3d Cir. 1972), as controlling in the present case. They argue that the prosecution was required to prove that the defendants knew of the federal involvement with the Department of Public Works. We disagree. Ebeling may very well stand for the proposition that where a federal agency is peripherally involved, proof is required that the defendants had actual knowledge of federal involvement. The present case is more akin, however, to cases where a federal agency has an interest in protecting its authorized functions and proof of knowledge of federal involvement is not necessary. Carwright, supra, United States v. Standford, 589 F.2d 285, 297 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). Even the court in Ebeling acknowledges that a broader standard applies in cases involving federal regulation:

> If the false writing or document constitutes a legally required record under a statute in some regulatory field, there may be an even broader liability under the section but that aspect is not here involved and calls for no consideration.

248 F.2d at 434. See also Bryson v. United States, 396 U.S. 64, 71 (1969) (statutory basis for federal agency's request for information provides jurisdiction enough to punish fraudulent statements under §1001).

their argument still fails. Defendant Canel, at the time of the transactions, was the Director of the Division of Roads and Highways in the Department of Public Works in the Government. As head of this division, one of his duties was to procure equipment like in issue here and this Court finds it difficult not to impute knowledge to Canel of the federal auditing procedures for expenditures made in his division which would eventually be brought to the attention of the government comptroller. Although the prosecution did not directly bring this point out, the jury had before it the character testimony of Gordon Finch, the Commissioner of Public Works while defendant Canel was head of the Division of Roads and Highways. Mr. Finch stated that Canel was the most efficient of his directors and if he were appointed again as Commissioner he would reappoint Canel to the same position. An efficient director of a government division surely would know the administrative process regarding division expenditures. The evidence presented was sufficient to infer that defendant Canel knew that the false statements would be brought to the attention of the government auditor, a federal agent, in the process of auditing the division's expenditures.

The above analysis applies as well to defendant Figueroa. As an aider and abettor, he is liable as a principal. 18 U.S.C. §2. See also United States v. Catena, 500 F.2d 1319, 1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974), (person guilty of fraud against agent of U.S. even if use innocent intermediary under 18 U.S.C. §2(b) and §287, a statute narrower on its face than §1001).[2]

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2 Even if Ebeling were applicable to this case, the Court is not inclined to give it much weight. Ebeling is cited in Waters, supra, as controlling without discussion of the facts or the legal principles involved. The major contention was that the alleged false records were directed to the Urban League of Philadelphia, a contractor with the U.S. Department of Labor, and not [illegible] The Third Circuit held that [illegible] appeal was [illegible] held the [illegible] tion. This Court doubts that that case is factually similar to the present case.

B. Section 371- Count 1

Count one alleges conspiracy to defraud the United States under 18 U.S.C. §371 by using interstate wire communications and transporting in interstate commerce money or property in violation of 18 U.S.C. §§1343 and 2314. The alleged conspiracy also included the misrepresentation to "public officials" regarding the role of defendant Figueroa as a bankruptcy administrator, the savings for purchasing the three trucks through Mr. Figueroa, and the cover-up.

The United States Supreme Court, in a case involving 18 U.S.C. §88 (1940 ed.), of which that section and 18 U.S.C. §294 were consolidated into §371, stated:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government.

Haas v. Henkel, 216 U.S. 462, 479 (1909) quoted in United States v. Winkle, 587 F. 2d 705, 708 (5th Cir. 1979). The counts of which the defendants were convicted were based on facts, especially the cover-up, which impaired or obstructed the lawful function of the U.S. Department of Interior through the government comptroller which was to accurately audit the Department of Public Works and recommend corrective action where necessary and to account for Department expenditures. Arguments expressed regarding §1001 apply here as well.

II. COMPOSITION OF THE JURY

Defendants also questioned the process of selection of the jury and the alleged bias of one juror in particular. Counsel for defendant Canel filed two affidavits describing the behavior of Juror No. 8, Palmira Benjamin, while in the jury box, as demonstrating a clear bias against the defendants. The affidavit attributes that behavior of bias against government offi[illegible] to her alleged distrust in officials stemming from her alleged

belief that there was an official "cover up" regarding her son's recent death.

Counsel for defendant Figueroa makes a broader attack. She alleges that the composition of the jury deprived the defendant of his Sixth Amendment constitutional right "to an impartial jury drawn from a fair cross section of the community." This deprivation came about, she claims, because the prosecutor exercised his peremptory challenges to exclude from the jury all persons of Puerto Rican descent. This insured, she alleges, "that the Puerto Rican defendants in the case would not find among those deciding their fate any persons who identified with them, were sympathetic to them, or who generally considered their presence anything but that of a stranger." Counsel suggests that the prosecutor should not, in the jury selection process, be allowed to frustrate a defendant's right to a representative jury by the exclusion of one element of the community, in this case, persons of Puerto Rican descent.

A. Canel's Claim of Bias by Juror Benjamin

A party attacking the integrity of the jury on the ground of a juror's prejudice must prove prejudice by a preponderance of the evidence. United States v. Riley, 544 F.2d 237, 242 (5th Cir. 1976), cert. denied, 430 U.S. 932 (1977). Defendant Canel's proof consists of an affidavit from Robert L. Wilson, Chief Investigator for the Federal Public Defender's Office. He sat at counsel table for the entire trial and observed Juror Benjamin "suck her teeth constantly"[3] whenever the defense counsel were active, and "make facial expressions of disgust or disbelief by rolling her eyes heavenward or frowning intensely." He also noted that she made remarks to fellow jurors, causing the latter to "snicker aloud".

3 This is a local custom which indicates feelings of disgust, anger, disbelief or irritation.

Never had Mr. Wilson, in his thirty years of involvement with the criminal justice system, seen such a hostile juror.

The second affidavit suggests why Juror Benjamin was hostile. It was offered by David H. Jackson, another investigator for the Federal Public Defender, who is a neighbor and friend of Juror Benjamin. He explained that Ms. Benjamin lost a son under unexplained circumstances while stationed with the U.S. Navy aboard an aircraft carrier. He said it was "widely circulated" in the Virgin Islands that there was an official "cover up" of the circumstances surrounding her son's death.

The Court does not consider the two affidavits, taken together, as proof by a preponderance of the evidence that Juror Benjamin entered the jury box prejudiced and predisposed against the defendants. The Court observed the behavior of all the jurors. Ms. Benjamin was alert and sometimes animated, not only when defense counsel was active. The prosecutor was subjected to various looks also which the defense mistakenly thought were directed only to the defendants. Various witnesses received the same treatment, which included prosecution witnesses as well. That she may have been more demonstrative during Canel's testimony was natural, since this was the highlight of the trial. Canel himself shouted, pointed, accused, defended, explained, argued, and gesticulated during both direct and cross-examination. The entire courtroom was alert and alive. All present know that Canel's hopes for acquittal rested largely on how he presented himself during his own testimony.

The notion that the death of her son, and a "cover up" by federal officials of the circumstances of that death, might have played an important role in creating bias against Canel is out of the question. If Ms. Benjamin had a bias

because of a federal "cover up", it would more likely be directed at the federal prosecutor than at one who was accused by federal authorities. Moreover, since she was a friend and neighbour of investigator Jackson, who was frequently in the courtroom an equally valid suggestion could be made of bias in favor of the defendants for whom that friend worked.

Mere hypothesizing or just plain guessing is not "preponderance of the evidence". Defendant Canel has not met the burden of proof for reversal or acquittal on the above cited grounds.

B. Jury Composition and Defendant Figueroa's Rights

The jury ultimately selected to hear the defendants' case consisted entirely of Black persons, ten women and two men, with four alternates, also Black. The prosecutor, with six peremptory challenges, exercised a sufficient number which resulted in the removal of all apparent Puerto Ricans from the jury. The defendants, with twelve peremptory challenges, used a sufficient number which resulted in the elimination of all apparent White persons. Thus, the combined actions of the prosecutor and defense counsel led to the elimination of all Puerto Ricans and White persons, resulting in the all-Black jury which counsel for defendant Figueroa now claims was supposedly "unrepresentative of a fair cross-section of the community." What, apparently, counsel really hoped for was not a "fair cross section of the community", but in reality a jury that included Puerto Ricans but excluded White persons.

Swain v. Alabama, 380 U.S. 202 (1964) is the dispositive case in this matter. It held that a defendant in a criminal case is not constitutionally entitled to a proportionate number of his race on the trial jury or the jury panels, and that the prosecutor's striking of persons of one race from the jury panel in one particular case, under the peremptory challenge system, does not constitute racial --

equal protection of the laws. To establish there is improper striking of jurors of one race, a defendant must show that the prosecutor's systematic use of peremptory challenges against persons of one race extended over a period of time. Swain, supra, 380 U.S. at 227.

Case development since then has refined that view. Of particular significance is United States v. Newman 549 F.2d 240 (2d Cir. 1977), where the circuit court reversed the actions of the U.S. District Court judge who ordered an inquiry into why the prosecutor exercised certain permptory challenges against Blacks. The Second Circuit responded:

> As the trial court noted, "the prosecutors honestly believed that the striking of Black veniremen would lessen the risk of bias in favor of the defendant and thereby increase the likelihood of a bias free jury." A prosecutor's opinion that particular veniremen are likely to base their conclusions as jurors on emotional factors such as fear, hate, or sympathy or pity rather than upon the evidence in the case, in the light of the Court's instructions of law, as it is their duty to do, is not an act of invidious racial descrimination.

Newman, supra , 549 F.2d at 249.

Figueroa makes no claim that over a period of time the prosecutors in the Virgin Islands have systematically excluded Puerto Rican veniremen where a Puerto Rican defendant is on trial. Neither the majority nor the dissenters in Swain, supra, permitted an inquiry into the use of the peremptory challenge where such a systematic exclusion was not in practice.

The mere act of a prosecutor in exercising his peremptory challenges to exclude persons of the same race as defendants, does not in and of itself leave that exercise open to inquiry. United States v. Greene, 626 F.2d 75, 76 (8th Cir) cert. denied 449 U.S. 876 (1980), citing to Swain supra.

Inherent in defendant Figueroa's claim is the suggestion that simply because all members of the jury were Black, and the defendants were Puerto Ricans, the defendants could not, and did not receive a fair trial. To respond to that, this Court adopts the precise language of the Second Circuit in Newman, supra, 549 F.2d at 250, note :

> Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case warrants it. All of the members of this court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.

This has been the experience of this Court both as an advocate and as a judge, in this jurisdiction. This Court also joins with the Second Circuit in the warning of the dangers of forcing inquiry into the reasons behind the exercise of peremptory challenges:

> The right to peremptory challenges is of great importance, both to the Government and to the defendants--but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury. If, for example, a defendant knows or has a strong suspicion that a particular venireman is hostile to him or believes the venireman has strong or militant views which would make it unlikely, in spite of the court's instructions, that the venireman would give fair and impartial consideration to the case, and yet the defendant does not have available sufficient evidence to prove these disqualifications on a challenge for cause, he can solve the problem with a peremptory challenge. The same considerations apply to a plaintiff or a prosecutor. Once, however, a plaintiff or prosecutor is required to submit to interrogation concerning his reasons for making a peremptory challenge, it will probably not be long before defendants will be required to do likewise. This, in all likelihood, would spell the end of peremptory challenges; and Blacks and other recognizable

> minority groups would thereby suffer a major loss in the removal of one of the greatest safeguards the law has provided for a fair trial.

Newman, supra, 549 F.2d at 250. Counsel's citation to People v. Payne, 50 U.S.L.W. 2748, an intermediate Illinois state court opinion, cannot outweigh the cases cited herein. Counsel urges that the rule that no reason need be given for a permptory challenge, must give way to a constitutional imperative. That stance is rejected here by this Court for the reasons cited above.

Counsel has shown nothing beyond the prosecutor's exercise of his peremptory challenges which would give rise to any suggestion that defendant Figueroa was deprived of his constitutional rights. The jury, which heard this case sifted through extensive evidence, demonstrated the care it gave to each defendant's case, by finding defendant Figueroa guilty on certain counts, and acquitting him on others. Defendant Figueroa's argument cannot stand.

III. JURISDICTION: TERRITORIAL COURT JURISDICTION OVER ARTICLE III SUBJECT MATTER

Counsel for defendant Figueroa, joined in by counsel for defendant Canel has submitted a supplemental memorandum arguing a novel issue as to whether this Court has jurisdiction to preside over this case where only federal crimes are charged. Counsel argues that applying the rationale of Northern Pipeline Construction Co. v. Marathon Pipe Line Co. et al. ___U.S.___, 50 U.S.L.W.4892, this Court as an Article I court does not have jurisdiction to hear cases which are generally heard in Article III courts. More specifically, counsel argues that this Court, because it serves a limited term, subject to political appointment every eight years, deprives her client of his due process right to have his case heard before an Article III court.

Northern Pipeline, held that the federal statute expanding the powers of bankruptcy judges was in violation of

Article III of the Constitution. The plurality opinion was written by Justice Brennan, and was joined by three other justices. We are of the opinion, however, that American Insurance Co. v. Canter, 26 U.S.(1 Pet.) 242(1828) is controlling. That case involved a question of whether a Florida territorial court had jurisdiction over an admiralty matter which was generally within the exclusive jurisdiction of Article III courts. Similar objections were raised regarding a territorial judge's limited tenureship. The Court held that although admiralty jurisdiction is exclusive in Article III courts in states, the same limitation did not extend to territories. 26 U.S. (1 Pet.) at 257. See also Palmore v. United States, 411 U.S. 389, 403 (1972)(American Insurance Co., is still viable law); Government of the Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974). This Court, therefore, has jurisdiction to preside over this case involving the federal criminal statutes of which the defendants have been convicted despite the fact that we are not an Article III court.

C O N C L U S I O N

The defendants have raised several other issues in their respective motions. They do not, however, have merit and will not be discussed. None of the issues discussed in this opinion warrant a judgment of acquittal or a new trial.[4] The issue of whether the crimes alleged actually come under the heading of "federal crimes" is difficult and validly asserted by the defendants. But the

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4 The issue raised by counsel as to the status of the District Court of the Virgin Islands in performance of functions identical to Article III judges is novel. In many ways the Court might ardently hope it is successfully pursued, for this could lead to lifetime status for the judges of this Court. Precedent, however, suggests otherwise. In Northern Pipeline, supra, at 4896, the Supreme Court discusses territorial courts, and [illegible] Congress [illegible] grant them jurisdiction [illegible] Article III courts.

Court is convinced that under the unique relationship of the Department of the Interior to the U.S. Virgin Islands embodied in Section 17 of the Revised Organic Act of 1954, the appropriate counts of the information do constitute federal crimes under 18 U.S.C. §1001.

Accordingly, the motions will be denied.

DATED this 17th day of November, 1982.

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL NO: 82-72
	)	
vs.	)	U.S.C. §§371; 2314; 1343; 1001,2
	)	
ORLANDO CANEL and	)	CONSPIRACY: TRANSPORTING CHECKS
JOSE (TONY) FIGUEROA,	)	OBTAINED BY FRAUD: WIRE FRAUD:
	)	FALSE STATEMENT
Defendants.	)	
	)	

FILED THIS DAY OF ... A.D. ...
... & WALLACE
Clerk of the ...
By ... Deputy

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DAVID V. O'BRIEN, Judge

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above-entitled matter be amended as follows:

1. The seventh line in the first full paragraph on page 3 shall be corrected to read: "See Harris v. Boreham, 233 F.2d"

2. The ninth line in the first full paragraph on page 3 shall be amended to read: "see also Dudley v. Commissioner of"

3. The second line in the second full paragraph on page 3 is amended to read: "false and fraudulent statements to purchase two tractor-trailer trucks and a dump truck, more specifically:to procure a"

4. Footnote 1 on page 4 is amended to read: "See 18 U.S.C. §1405v."

5. The twentieth line in the first full paragraph on p.5 is corrected to read "United States v. Gilliland, 312 U.S. 86, 93 (1940)."

6. The second line in the first full paragraph is corrected to read: "sub nom., Rhearling v." on page 6.

7. The following portion of line seven of the third paragraph on page 8 is deleted: "to the death of her son three months ago,"

8. Footnote 3 on page 9 is corrected to read: "anger, disbelief, or irritation."

9. Lines four, five and six of the last paragraph on page 12 is corrected to read: "United States v. Greene, 626 F.2d 75, 76 (8th Cir.), cert. denied, 449 U.S. 876 (1980), citing to Swain, supra."

10. Line six of the first paragraph on page 13 is corrected to read: "Circuit in Newman, supra, 549 F.2d at 250, n.8:"

11. Line five in the first paragraph on page 14 is corrected to read: "Newman, supra, 549 F.2d at 250, n.8."

12. In lines 4 and 12 in the first paragraph on page 15, the citation to American Insurance Co. v. Canter is corrected to read: "26 U.S. (1 Pet.)"

13. Line 5 in the only paragraph on page 16 is amended to read: "federal crimes under 18 U.S.C.§§1001, 2, and 371."

DATED this 24th day of November, 1982.

ENTER:

David V. O'Brien

DAVID V. O'BRIEN, Judge

A T T E S T:

GEOFFREY BARNARD
Clerk of the Court

By Frank Hackney
Deputy Clerk